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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

LONNIE JAMES BALL, Alias L. J. BALL,
Petitioner,

vs.

THE STATE OF ALABAMA,
Respondent.

No. .....

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

The petitioner, Lonnie James Ball, alias L. J. Ball, respectfully shows to this Honorable Court:

### STATEMENT OF MATTER INVOLVED.

Your petitioner, a male negro citizen of the United States and a resident of the State of Alabama, was indicted during the spring term of 1948 by the Grand Jury of Calhoun County, Alabama. The indictment charged petitioner with first degree murder (Rec. p. 1), and by operation of

law also included the lesser offenses of murder in the second degree, manslaughter in the first degree, and manslaughter in the second degree—**Title 15, Sec. 323, Alabama Code of 1940.** On May 22, 1948, petitioner was arraigned and pleas of not guilty and of not guilty by reason of insanity were interposed (Rec. p. 3). There was no order entered by the court of the appointment of counsel to represent petitioner upon the arraignment or upon the trial. On June 7, 1948, a purported motion to quash the venire of the petit jury was filed in said cause (Rec. p. 3), which said motion was stricken upon motion of the Solicitor for the State of Alabama. On said date petitioner was put to trial upon the issues presented by the indictment and the pleas of not guilty and of not guilty by reason of insanity theretofore entered in his behalf. He was thereupon convicted of murder in the first degree and his punishment was fixed at death (Rec. p. 16). Sentence was pronounced on June 11, 1948. A motion for a new trial was timely filed in petitioner's behalf on June 11, 1948, which said motion for a new trial was duly continued by the court from time to time and as amended was overruled September 3, 1948, to which ruling petitioner duly excepted (Rec. p. 761). An appeal to the Supreme Court of Alabama was timely taken (Rec. p. 262). **Title 15, Sec. 282 (2), 1947, Cum. Suppl. to Vol. 4, 1940, Code of Alabama.** On the 30th day of June, 1949, the Supreme Court of Alabama affirmed the judgment and sentence rendered in said cause (Rec. p. 274). Timely application was duly made to the Supreme Court of Alabama for a rehearing in said cause and to set aside and hold for naught the judgment rendered in said cause on June 30, 1949, by the Supreme Court of Alabama, affirming the conviction and judgment rendered in the Circuit Court of Calhoun County, Alabama, in said cause (Rec. p. 276). Said application for rehearing was denied by the Supreme Court of Alabama on the 17th day of November, 1949 (Rec. p. 277).

There was evidence adduced upon the trial of your petitioner which would have justified an unbiased jury in finding petitioner intoxicated to such a degree at the time of the commission of the homicide that he was utterly incapable of any rational action and hence utterly incapable of forming the specific intent essential to a malicious killing and was sufficient to negative the premeditation and deliberation essential to murder in the first degree. **Ivory v. State,** 186 So. 460, 237 Ala. 344 (Rec. p. 67); (Rec. pp. 75, 76, 78); (Rec. pp. 81, 82); (Rec. pp. 85, 86); (Rec. pp. 89, 90, 91).

The evidence for the State tended to show that the homicide occurred in the City of Oxford on the premises of a combination service station and store between the hours of 3:30 and 4:30 p. m. (Rec. p. 19); that the deceased, who was Chief of Police for the City of Oxford, came to the scene of the homicide, accompanied by another policeman, a Mr. Billingsley, after having been summoned there because of a disturbance created by your petitioner, who was cursing and using loud language in the presence of white persons and other negroes who had accompanied your petitioner to the scene, and who were unable to control the wild and uninhibited conduct of petitioner (Rec. p. 122); that the two officers arrested your petitioner and placed him in the police car unarmed, whereupon your petitioner sprang from the car, took hold of Officer Billingsley; that Officer Billingsley and petitioner both fell to the ground, during which fall Officer Billingsley's pistol was fired (Rec. p. 27) and continued firing in rapid succession five times; that the deceased, Chief of Police Sparks, fell after the first shot was fired (Rec. p. 27). There was no evidence tending to prove any ill will existing between the deceased and petitioner prior to the homicide. On the other hand, petitioner testified that he and the deceased were friends (Rec. p. 90).

On the hearing of the motion for a new trial the Honorable Richard B. Emerson, a lawyer, testified, upon being called by petitioner, that he was in the court room on the day of arraignment of petitioner and was asked by Judge Field to stand by petitioner upon arraignment, which he did (Rec. p. 138). Witness also testified that he had not previously been requested to be present at arraignment of petitioner, had never seen petitioner prior to arraignment, did not discuss the case with petitioner, did not introduce himself to petitioner and never conferred with or had any contact at all with petitioner, either before or after the arraignment, and did not aid in the preparation of petitioner's case in any way (Rec. p. 139). Mr. Emerson also testified that he advised the court at the time of petitioner's arraignment that he was not in a position to represent and defend petitioner (Rec. p. 140). Pleas of not guilty and of not guilty by reason of insanity were interposed in behalf of petitioner upon the arraignment.

There was no plea in abatement attacking the indictment on the ground that members of the petitioner's race were systematically and intentionally excluded from serving on the Grand Jury which indicted petitioner, and had been so excluded for a period of many years prior to petitioner being indicted in the instant case. **Code of Alabama 1940, Title 15, Section 278.** Petitioner's substantial right was herein waived. **Title 15, Section 279, Code of Alabama 1940.**

The judge presiding and hearing the motion for new trial (the trial judge having previously died) took judicial notice of the official United States Census for Alabama and of the fact that the last United States Census for Calhoun County, Alabama, designated a population in that county of slightly more than twenty per cent colored persons, some 12,900 odd negroes and about 50,275 whites (Rec.

p. 174). Although a subpoena duces tecum was duly executed calling for the jury roll of said county, the Judge sustained the objections of the Solicitor for the State to its production in court as evidence on the motion for a new trial. The evidence further disclosed that during the entire period of time the Clerk of the Jury Commission of Calhoun County, Alabama, had served, a period of more than five years, the jury box had not been emptied and refilled, although it had to some extent been replenished from time to time (Rec. p. 170). There were no negroes summoned to serve as Grand Jurors at the time petitioner was indicted. The Grand Jury which indicted petitioner was selected on April 26, 1948, and thirty persons were summoned (Rec. pp. 141, 143). One hundred names were drawn to constitute the venire from which the petit jury which tried petitioner on June 7 and 8, 1949, was selected and no negroes were in that number (Rec. p. 145). It was disclosed that one negro had served on the Grand Jury during the five years next preceding the indictment of petitioner (Rec. p. 153), and that approximately one hundred and twenty persons were called for Grand Jury service in Calhoun County each year (Rec. p. 155); that only one negro had been called to serve on the petit jury during the said five-year period (Rec. p. 153), and that around four to five hundred jurors are summoned for petit jury service each year.

One member of the Jury Commission testified that he had put approximately four hundred names in the box and that there were among that number only about five negroes; that of the twenty-four hundred or twenty-five hundred names in the jury box (Rec. p. 185) there were only between twenty-five and thirty who were negroes (Rec. pp. 186, 187). Another member of the Jury Commission testified that since he had served on the Jury Commission approximately six hundred names had been

**put in the box and among them were only eight negroes (Rec. pp. 193, 195). The remaining member of the Jury Commission testified he had submitted approximately four hundred names to be placed in the jury box (Rec. p. 198), and that in that number there were only about eight negroes (Rec. p. 199).**

Petitioner's present counsel, not representing petitioner upon the trial of this case, participated in a judicial hearing presided over by Judge Field, the trial judge, wherein Mr. Joe Cockrell, the Circuit Solicitor for the State of Alabama, and Mr. Ben Dorman, the County Solicitor for Calhoun County, Alabama, represented the State of Alabama. The hearing was held on the evening of May 31, 1948, and had been arranged by Judge Field the week prior to that date. During the hearing petitioner's present counsel requested a continuance of the case for a reasonable time, approximately two weeks. Petitioner's counsel stated as their reason for making this request that they had been consulted about employment in petitioner's case by friends interested in petitioner, but that no agreement had been reached in that regard. However, petitioner's counsel stated that they had been informed and believed that petitioner had been connected with the Armed Forces of the United States Government in the South Pacific Theater of War for approximately four years, and according to the information received was suffering from some malady or illness contracted during that service in the army, and that they believed it necessary to a proper defense of petitioner that an investigation be conducted in this connection which would be impossible in the short time before the trial date (Rec. pp. 245-247). Judge Field, the trial judge, thereupon said to Mr. Joe Cockrell, the Circuit Solicitor for the State of Alabama, "Well, Joe, what do you say?" To which question the Solicitor replied, "Well, Judge, I feel that the case ought to go to trial"; at which

point the County Solicitor stated, "Judge, if this case is continued there will never be another negro that kills a white man that will go to trial in Calhoun County." Whereupon petitioner's present counsel stated to the trial judge that if that was the state of mind of the people of Calhoun County, then obviously the case should not go to trial. Whereupon Judge Field stated: "I am going to put him to trial," and further stated: "Roderick, if I pass this case the people of this county will storm the jail" (Rec. p. 247). The continuance was denied and petitioner's present counsel did not undertake the defense of your petitioner upon the trial of his case.

No entry was made on the records of the Circuit Court of Calhoun County, Alabama, of the appointment of counsel to represent petitioner upon the trial of this case in any stage thereof. On the hearing of the motion for a new trial it was disclosed that your petitioner's trial attorney was selected by the trial judge on the morning of June 3, 1948, around 7:00 or 7:30 o'clock, a. m., as he was dining with his wife in the dining room of the Noble Arms Apartment in Anniston, Alabama, at which time your petitioner's trial judge approached the attorney who represented your petitioner upon the trial of his case before the petit jury, and invited him to another table and there requested him to represent petitioner at his trial, to help him (Judge Field, your petitioner's trial Judge) out in a difficulty (Rec. p. 157). Your petitioner's trial attorney thereupon stated to Judge Field that it was impossible for him to prepare the case on such short notice (Rec. p. 157). Your petitioner's trial attorney, on the hearing of the motion for a new trial, testified that during the past fifteen or twenty years his practice had been practically of a civil nature.

According to the evidence presented by the petitioner on the hearing of the motion for a new trial, he was denied the

right to consult with any one, including members of his family, at any time prior to his arraignment, and was not allowed to consult or advise with members of his family or any one else, with one exception, an occasion when his trial attorney came to the jail and conferred with him for approximately thirty minutes or forty-five minutes (Rec. p. 227). Petitioner is an uneducated laborer without any knowledge or experience concerning court proceedings (Rec. p. 228). No motion for a change of venue was filed on behalf of petitioner. No plea in abatement was filed properly raising objections to the indictment on the ground that members of petitioner's race had been systematically and intentionally excluded from serving upon the Grand Jury which indicted your petitioner and had been so systematically and intentionally excluded from Grand Juries in Calhoun County for a long period of time.

Your petitioner takes the position that had counsel, "standing by" your petitioner upon the arraignment, interposed a plea in abatement prior to his interposing pleas of not guilty and of not guilty by reason of insanity, such plea in abatement would probably have been sustained by the trial court, or would have constituted error to a reversal of this cause, and the failure of counsel "standing by" petitioner upon his arraignment to interpose such a plea in abatement prior to waiving this substantial right of your petitioner by filing pleas in bar, was the result of the empty formality of the Court in designating counsel to "stand by" your petitioner upon the arraignment, without placing any definite responsibility upon such attorney to represent your petitioner upon the arraignment (Rec. pp. 137-141).

Your petitioner takes the position that had counsel designated by the trial court to "stand by" your petitioner upon his arraignment, filed a proper motion for a change of venue, such motion would probably have been sustained

and your petitioner would probably have been afforded a trial by a jury free of the hostility, prejudice and bias admitted by the trial judge to exist, or the failure of the trial court to have granted such motion for a change of venue would have been error to a reversal of this cause.

Your petitioner takes the position that the necessity of counsel was so vital and imperative upon the arraignment that the failure of the trial court to make an effective appointment of counsel was a denial of due process and the equal protection of the laws within the meaning of the Fourteenth Amendment to the Federal Constitution. Your petitioner further takes the position that the action of the trial court in knowingly forcing petitioner to trial in an atmosphere of hostility, prejudice and resentment sufficient to coerce the verdict of the jury which the court itself recognized as existing, was a denial of due process and the equal protection of the laws within the meaning of the Fourteenth Amendment to the Federal Constitution. Your petitioner also takes the position that he was denied due process of law and the equal protection of the laws within the meaning of the Fourteenth Amendment to the Federal Constitution in that he was denied the right to effective and substantial aid of counsel upon the trial of his case before the petit jury of Calhoun County, Alabama, which rendered a verdict of guilty against your petitioner and fixed his punishment at death by electrocution.

## THIS COURT HAS JURISDICTION.

The Act of Congress of June 25, 1948, **Title 28, United States Code of Judiciary and Judicial Procedure, Approved June 28, 1948, Sec. 1257 (3)**, authorizes review by the Supreme Court of the United States by certiorari in any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state,

"where any title, right, privilege or immunity is specially set up or claimed under the constitution * * *."

**Supreme Court Rule 38, Sec. 5 (b)** provides for review by the Supreme Court of the United States,

"where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court."

Where the denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that the United States Supreme Court scrupulously review the Record. **Avery v. State of Alabama,** 60 Sup. Ct. 321, 308 U. S. 444, 84 L. Ed. 377; **Powell v. State of Alabama,** 77 L. Ed. 158, 53 Sup. Ct. 55, 287 U. S. 45, 84 A. L. R. 527.

Where a right, title, claim or immunity is claimed under the Constitution of the United States, the Supreme Court of the United States must inquire not merely whether that right, title, claim or immunity has been expressly denied, but also whether they have been denied in substance and effect and it must review independently both legal issues and the factual matters with which they are commingled. **Oyama v. State of California** (1948), 68 Sup. Ct. 269, 322 U. S. 633, 92 L. Ed. 249; **Norris v. State of Alabama** (1935), 55 Sup. Ct. 579, 294 U. S. 587, 79 L. Ed. 1074; **Patterson v. State of Alabama** (1935), 55 Sup. Ct. 575, 294 U. S. 600, 79 L. Ed. 1082; **U. S. v. Pink** (1942), 62 Sup. Ct. 552, 315 U. S. 203, 86 L. Ed. 796.

## THE QUESTIONS PRESENTED.

1. The Supreme Court of the State of Alabama has, by its decision, affirmed a judgment of conviction in a capital case rendered as the product of a trial in which this peti-

tioner was denied due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States in that the trial was not conducted according to the due cause of regular procedure provided by law in the State of Alabama, this petitioner being denied the effective and substantial aid of counsel upon his arraignment.

2. The Supreme Court of Alabama has by its decision affirmed a judgment by conviction in a capital case rendered as the product of a trial wherein this petitioner was denied due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States in that he was forced to trial by his trial judge in an atmosphere of local public opinion, known to exist by the trial judge, which was so hostile and prejudicial, biased and inflamed that your petitioner probably could not have had a fair, impartial and deliberate trial.

3. The Supreme Court of Alabama has, by its decision, affirmed a judgment of conviction in a capital case rendered as the product of a trial wherein this petitioner was denied due process of law and the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States specifically as follows:

(a) He was not given a fair, impartial and deliberate trial.

(b) He was denied the right of counsel with the accustomed incidents of consultation and opportunity of preparation for trial.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Supreme Court of Alabama, in said case, decided the Federal question of substance as to whether or not this petitioner was denied the effective assistance of counsel upon his arraignment by holding that the trial court's action in designating a lawyer present in the court room upon the day of petitioner's arraignment to "stand by," who was not familiar with petitioner's case and who was not expected to investigate petitioner's case, and did not investigate petitioner's case, and who did not consult with petitioner, or introduce himself to petitioner prior to interposing pleas in bar in petitioner's case, and thereby waiving substantial rights of your petitioner, and upon whom no responsibility was placed by the trial court in connection with the defense of your petitioner, was the effective and substantial assistance of counsel within the meaning of due process of law and equal protection of the laws provided by the Fourteenth Amendment to the Constitution of the United States, which decision is not in accord with the decisions of this Court, including the case of **Powell v. State of Alabama**, 77 L. Ed. 158, 53 Sup. Ct. 55, 287 U. S. 45, 84 A. L. R. 527.

2. The Supreme Court of Alabama, in said case, decided a Federal question of substance as to whether or not this petitioner was denied due process of law and the equal protection of the laws against this petitioner by holding that this petitioner was not denied a trial by a fair and impartial, or an unbiased and unprejudiced jury by being forced to trial by the trial judge in an atmosphere of hostility, resentment and prejudice so strong and heated that the trial judge himself admitted, one week prior to the trial, that the people of Calhoun County would storm the jail if petitioner's case was passed in order for further

investigations to be conducted on behalf of petitioner, which decision is probably not in accord with applicable decisions of this Court, including **Patton v. United States,** 281 U. S. 276, 50 Sup. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263.

3. The Supreme Court of Alabama is the highest court of the State of Alabama and petitioner has exhausted his remedy in that Court; that the judgment appealed from is a final judgment and presents federal questions of substance and importance worthy of the consideration of the Supreme Court of the United States.

A copy of the entire record in this case, certified to be correct by the Clerk of the Supreme Court of Alabama, is presented to this Court and filed herewith as an exhibit hereto.

**PRAYER FOR WRIT.**

Wherefore, your petitioner doth pray that a writ of certiorari issue to the Supreme Court of Alabama to the end that the errors aforesaid may be corrected.

LONNIE JAMES BALL, alias
L. J. BALL,

By.....
G. ERNEST JONES,
Of Birmingham, Alabama,
Counsel for Petitioner.

RODERICK BEDDOW,
G. ERNEST JONES, JR.,
Of Birmingham, Alabama,
Of Counsel for Petitioner.

# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

## THE OPINION BELOW.

The opinion of the Supreme Court of Alabama is reported in 42 Southern Reporter (2d) 626. The opinion is also contained in the Record (Rec. pp. 267-273).

## JURISDICTION.

1. The date of the judgment sought to be reviewed is January 30, 1949. Petition for rehearing was denied by the Supreme Court of Alabama on November 17, 1949 (Rec. p. 277).

2. The statutory provision which is believed to sustain the jurisdiction of this Court in title 28, U. S. Code, Judiciary and Judicial Procedure, approved January 28, 1948, Sec. 1257 (3), 28 U. S. C. A., Section 1257 (3).

3. Petitioner earnestly insists that he is not guilty of the offense for the commission of which he was convicted. He insists that his conviction was probably the result of his having been denied due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States in the following respects: Your petitioner is an ignorant and uneducated negro laborer, without any knowledge concerning court procedure (Rec. p. 228). He was brought into court on May 22, 1948, for arraignment and had no counsel to represent him. He had been continuously confined in the Calhoun County jail in Anniston, Alabama, since May 7, 1948, the date of the commission of the alleged offense, without being permitted to consult with anyone, includ-

ing members of his own family (Rec. p. 227). Under the law of Alabama he was required to plead to the indictment or the Court would have entered a plea of "not guilty" for him (Title 15, Section 276, Alabama Code of 1940, Appendix A). Without anyone advising your petitioner and without his having any knowledge of the proceedings taking place, the trial judge told a lawyer, who happened to be present in the court room, to "stand by" your petitioner and enter pleas suggested by the Court in petitioner's behalf, namely, pleas of "not guilty" and "not guilty by reason of insanity," which pleas were entered in behalf of your petitioner. The lawyer so casually designated by the trial judge to enter pleas in petitioner's behalf upon his arraignment did not introduce himself to petitioner; did not converse with petitioner or in any way consult with and advise petitioner of the effect of the pleas entered in his behalf, or suggest to your petitioner any other pleas which might be entered in his behalf, and did not request petitioner's consent to the pleas so entered in behalf of your petitioner upon his arraignment. Petitioner was not informed by the Court, or the lawyer designated by the Court to "stand by" him upon his arraignment, that his rights were being waived and that he could not later object to the indictment for the reason that members of his race were systematically and intentionally excluded from the Grand Jury which returned the indictment against him, and had been so excluded from the Grand Juries of Calhoun County, Alabama, for a long period of time (Rec. pp. 138-140) (Title 15, Sec. 278, Alabama Code of 1940, Appendix B). The Court did not place such importance upon the designation of counsel to "stand by" petitioner upon his arraignment as to enter such designation upon the Minutes of said Court as a formal appointment by said Court, even though the Circuit Court of Calhoun County, Alabama, is a Court of Record. Petitioner was entitled to the appointment of counsel to represent him upon his ar-

raignment (Title 15, Sec. 318, 1947 Cumulative Supplement to Volume 4 of the 1940 Code of Alabama, Appendix C). Thus your petitioner was denied the substantial and effective representation by counsel at an important stage of his trial. He thereby suffered grievous injuries.

Your petitioner was brought to trial before a petit jury of Calhoun County, Alabama, on June 7, 1948. On June 3, 1948, petitioner's trial judge casually requested the Honorable Hugh Walker, an attorney whose practice had consisted principally of a civil nature for a great many years, to represent your petitioner upon his trial to help him, the trial judge, out in a difficulty (Rec. p. 157). This request was made at the breakfast hour in the Noble Arms Apartments in the City of Anniston, Calhoun County, Alabama, at a time when the Honorable Hugh Walker was having breakfast. The Honorable Hugh Walker reluctantly accepted your petitioner's defense, stating at the time that he did not feel he could prepare the case in so short a time. No formal order of appointment of counsel to represent petitioner before the petit jury of Calhoun County was entered of record in the Circuit Court of Calhoun County, Alabama. The Honorable Hugh Walker consulted with your petitioner on only one occasion for about thirty minutes prior to his trial before a petit jury (Rec. p. 227).

Neither of the attorneys designated by the trial court to attend your petitioner upon his arraignment and upon his trial before a petit jury, filed a motion for a continuance, or a motion for a change of venue, or took any necessary measures to protect your petitioner from the biased, hostile and inflamed sentiments existing in Calhoun County at the time of his trial before a petit jury. Public sentiment was so inflamed against your petitioner that the trial judge himself stated that the people of Calhoun County would storm the jail if petitioner was not brought to trial before

a jury on June 7, 1948, and the county attorney for Calhoun County stated that there never would be another negro tried in Calhoun County if petitioner was not brought to trial on June 7, 1948 (Rec. p. 247). Obviously such biased, hostile and inflamed public sentiment against your petitioner did coerce the verdict of the jury in this case.

The jurisdiction of the Court is sustained by numerous cases decided by the Supreme Court of the United States, including **Powell v. State of Alabama**, 53 Sup. Ct. 55, 64 L. Ed. 158, 84 A. L. R. 527; **Patton v. U. S.**, 281 U. S. 276, 50 Sup. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263; **Avery v. State of Alabama**, 60 Sup. Ct. 321, 308 U. S. 444, 84 L. Ed. 377; **Patterson v. State of Alabama**, 55 Sup. Ct. 575, 294 U. S. 600, 79 L. Ed. 1082; **Norris v. State of Alabama**, 55 Sup. Ct. 579, 294 U. S. 587, 79 L. Ed. 1074.

## STATEMENT OF THE CASE.

This has already been stated in the preceding petition under "Statement of Matter Involved," which is hereby adopted and made a part of this brief.

## SPECIFICATIONS OF ERROR.

1. The Supreme Court of Alabama erred in affirming a judgment of conviction in a capital case rendered as a product of a trial in which this petitioner was denied due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States in that the trial was not conducted according to the due course of regular procedure provided by the law in the State of Alabama, this petitioner being denied the effective and substantial aid of counsel upon his arraignment.

2. The Supreme Court of Alabama erred in affirming a judgment of conviction in a capital case rendered as the product of a trial wherein this petitioner was denied due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States in that he was forced to trial by his trial judge in an atmosphere of local public opinion known to exist by the trial judge, which was so hostile and prejudicial, biased and inflamed that your petitioner could not have had a fair, impartial and deliberate trial.

3. The Supreme Court of Alabama erred in holding that petitioner was given a fair, impartial and deliberate trial.

4. The Supreme Court of Alabama erred in holding that petitioner was not denied the right of counsel with the accustomed incidents of consultation and opportunity of preparation for trial.

POINT I.

**The requirement of conforming to fundamental standards of procedures in criminal trials was made operative against the states by the Fourteenth Amendment to the Constitution of the United States.**

**Louie Young v. Coleman**, 5 Fed. Sup. 702;

**Chambers v. State of Fla.**, 60 Sup. Ct. 472, 309 U. S. 227, 84 L. Ed. 716;

**Smith v. O'Grady**, 61 Sup. Ct. 572, 312 U. S. 329, 85 L. Ed. 859.

POINT II.

**The right of accused to assistance of counsel includes the right to assistance of counsel from time of arraignment until beginning of his trial, with consultation, thorough-going investigation and preparation are vitally important.**

**Powell v. State of Alabama**, 53 Sup. Ct. 55, 64 L. Ed. 158, 84 A. L. R. 527;

**Von Moltke v. Gillies**, 332 U. S. 708, 68 Sup. Ct. 316.

POINT III.

**Every reasonable presumption is indulged against a waiver of fundamental rights. To be a valid waiver of fundamental rights it must be understandingly and intelligently made.**

**Glasser v. U. S.**, 315 U. S. 60, 61, 62 Sup. Ct. 457, 86 L. Ed. 680.

POINT IV.

**When a court or an officer of the court has knowledge requiring the exercise of a duty on accused's behalf, failure to exercise such duty constitutes a denial of due process of law.**

**Mooney v. Holohan**, 294 U. S. 103, 55 Sup. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406;

**Hall v. Johnson**, Ninth Circuit, 91 Fed. (2d) 363;
**Robinson v. Johnson**, 50 Fed. Sup. 774, 776.

POINT V.

**Arraignment is the first step in the trial of a criminal case.**

**Harmon v. State of Alabama**, 62 So. 438, 8 Ala. App. 31;
**Howard v. State of Alabama**, 50 So. 954, 165 Ala. 18;
**Presley v. State of Alabama**, 113 So. 485, 22 Ala. App. 167;
**Code of Alabama 1940**, Title 15, Secs. 276-277;
**Polk v. State of Oklahoma**, 26 Okla. Crim. 283, 224 Pac. 194;
**State v. Fowler**, 59 Montana 346, 196 Pac. 992, 197 Pac. 487;
**State v. Murphy**, 68 Montana 427, 219 Pac. 629;
**Robinson v. State**, 178 Miss. 568, 173 So. 451;
**State v. Cowan**, 25 Wash. (2d) 341, 170 Pac. (2d) 653;
**State v. Seafield**, 129 Wash. 295, 224 Pac. 941.

POINT VI.

**The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.**

**Glasser v. U. S.**, 315 U. S. 60, 62 S. Ct. 457, 467, 86 L. Ed. 680;
**Snider v. Massachusetts**, 291 U. S. 97, 116, 54 S. Ct. 330, 336, 78 L. Ed. 674, 90 A. L. R. 575;
**Tumey v. Ohio**, 273 U. S. 510, 535, 41 S. Ct. 437, 445, 71 L. Ed. 749, 50 A. L. R. 1243;
**Patton v. U. S.**, 281 U. S. 276, 292, 50 S. Ct. 253, 256, 74 L. Ed. 854, 70 A. L. R. 263.

## ARGUMENT.

In support of the petition for a Writ of Certiorari in this cause the following argument is herewith submitted: The brevity with which the subject matter is treated is, we sincerely trust, in accordance with the practice in the Supreme Court of the United States. Such brevity should not be indicative of lack of confidence in the cause we represent, or a lack of faith in the substantial and fundamental question of widespread importance involved herein.

It is respectfully submitted that the petitioner, Lonnie James Ball, alias L. J. Ball, is an ignorant negro laborer with no knowledge of Court proceeding. Under the Statutes of the State of Alabama he was entitled to counsel upon his arraignment. At which time it was mandatory under the law of Alabama that he plead to the indictment charging him with a capital offense for which he was convicted.

> **Code of Alabama**, 1940, Title 15, Section 318, 1947, Cumulative Supp. to Vol. 4, appendix A; Title 15, Sections 278, 279, 276, 1940, **Code of Alabama**, Appendices B, C, and D.

Petitioner was brought into Court on the day of his arraignment, and he was without counsel to represent him, advise with him or do the things necessary and proper to his defense at this vital stage of his trial. The Trial Court designated a lawyer present in the courtroom to enter pleas in behalf of petitioner, which pleas were suggested by the court. Petitioner's rights and desires were completely ignored. The lawyer designated by the Court did not introduce himself to the petitioner, did not converse with petitioner, did not consult with petitioner, did not advise with petitioner, made no investigation whatsoever and even advised the Court that he could not represent petitioner.

Pleas were entered for petitioner. He had no understanding knowledge of the proceedings taking place. He had no voice in the proceeding taking place. Such a designation fell far short of meeting, in a proper sense, the requirement for appointment of counsel. The Circuit Court of Calhoun County is a Court of Record, no entry was made on such record of an appointment of counsel. For aught that appears in the record the trial Judge did not consider such casual designation an appointment at all. In the case of **Powell v. State of Alabama**, 53 Sup. Ct. 55, 287 U. S. 45, 77 L. Ed. 158, 84 A. L. R. 527, the Supreme Court of the United States, among other things, stated as follows:

> "In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against the defendants, that is to say from the time of their arraignment until the beginning of their trial when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

The Supreme Court of the United States has held in the case of **Hawk v. Olson**, 326 U. S. 276, 66 Sup. Ct. 116, 120, 90 L. Ed. 61, that denial of opportunity to consult with counsel on any material subject after indictment or similar charge violates the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the United States in **Von Moltke v. Gillies**, 332 U. S. 708, 719, 68 Sup. Ct. 316, referred to its decision in **Powell v. State of Alabama**, 287 U. S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, where the trial court, instead of appointing counsel particularly charged

with the specific duty of representing the defendants, appointed the entire local bar, and stated:

> "It is in this light that we view the appointment of counsel for petitioner when she was arraigned. This lawyer, apparently reluctant to accept the case at all, agreed to represent her only when promised by the judge that it would take only two or three minutes to perform his duty. And it seems to have taken no longer. Even though we assume that this attorney did the very best he could under the circumstances, we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner. Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime. The hollow compliance with the mandate of the Constitution at a stage so important as arraignment might be enough in itself to convince one like petitioner, who previously had never set foot in an American courtroom, that a waiver of this right to counsel was no great loss—just another legalistic formality. We are unable to agree with the government's argument that the momentary appointment of the lawyer for arraignment purposes supports the contention that the petitioner intelligently waived her right to counsel."

In the instant case petitioner was not given an opportunity to even make a purported waiver of his constitutional and statutory right to counsel to represent him upon the arraignment.

Prior to trial and upon arraignment an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and law involved, and then to offer his informed opinion as to what

plea should be entered. This duty cannot be discharged as though it was a mere procedural formality, for arraignment is too vital a stage in a criminal proceeding to give such wholly inadequate representation to one charged with crime as was given to accused in the instant case upon his arraignment. The designation of counsel made by the trial judge upon petitioner's arraignment was so wholly inadequate and ineffective as to constitute a denial of accused's right to counsel. This position is well supported by this Honorable Court's decisions in **Powell v. State of Alabama**, 287 U. S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527; **Von Moltke v. Gillies**, 332 U. S. 708, 68 Sup. Ct. 316, and other notable decisions of this Honorable Court, including the case of **Glasser v. U. S.**, 315 U. S. 60, 62 Sup. Ct. 457, 86 L. Ed. 680, wherein the Court, speaking through the late lamented Mr. Justice Murphy, stated as follows:

> "The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the Assistance of Counsel for his defense.' 'This is one of the safeguards * * * deemed necessary to insure fundamental human rights of life and liberty' and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. Johnson v. Zerbst, 304 U. S. 458, 462, 463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461. Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth

> Amendment, Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired * * *"

The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is contrary to the fundamental ideas of fairness and right. It is urged that in the instant case there was such a failure to make an effective appointment of counsel to represent your petitioner upon his arraignment as to vitiate the conviction and the judgment thereon is the product of a trial in contravention of the Fourteenth Amendment to the Constitution of the United Sates. Petitioner was grievously injured by this failure.

By statute enacted by the Legislature of the State of Alabama it is mandatory that objections going to the formation of the Grand Jury which presented the indictment must be made by plea in abatement before pleading "not guilty"—Title 15, Section 278, 1940 Code of Alabama, Appendix B; **Hale v. State of Alabama**, 10 Ala. App. 22, 64 So. 530. The plea in abatement raising objection to the formation of the Grand Jury comes too late after a plea of "not guilty." **Whitehead v. State of Alabama**, 206 Ala. 288, 90 So. 351; **Wimbush v. State of Alabama**, 237 Ala. 153, 186 So. 145; Title 15, Sec. 279, 1940 Code of Alabama, Appendix C.

Thus petitioner's substantial rights were probably waived as the result of the ineffective designation of counsel to represent him upon his arraignment. There can be no presumption of acquiescence of the loss of a fundamental right. **Ohio Bell Telephone Co. v. Public Utilities Commission**, 301 U. S. 292, 307, 57 Sup. Ct. 724, 731, 81 L. Ed. 1093. On the contrary "every reasonable presumption is in-

dulged against a waiver of fundamental rights such as the right of the accused to have the full and untrammeled assistance of counsel in the trial of a criminal case." **Glasser v. U. S.**, 315 U. S. 60, 61 (Head Note 8), 62 Sup. Ct. 457, 86 L. Ed. 680. Or the right of an accused charged with a capital offense to raise constitutional objections to the formation of the Grand Jury which returned the indictment charging him with a capital offense.

The Supreme Court of the United States in the case of **Powell v. State of Alabama**, 287 U. S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, said:

> "However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial."

Had petitioner's counsel filed a plea in abatement upon the arraignment, prior to entering pleas of "not guilty" and "not guilty by reason of insanity," such a plea in abatement would have been sustained, or would have constituted error to a reversal of this cause. Calhoun County, according to the last official United States census, had a population of slightly more than twenty per cent colored persons, some twelve thousand nine hundred odd negroes and about fifty thousand two hundred seventy-five whites (Rec. p. 174). The Clerk of the Circuit Court of Calhoun County, Alabama, on the hearing of the motion for a new trial, testified that the Grand Jury which indicted petitioner was selected April 26, 1948 (Rec. p. 141), and that thirty persons were summoned to serve as Grand Jurors at the time petitioner was indicted, none of whom were negroes (Rec. p. 143). It was disclosed that there were two thousand five hundred names in the jury box (Rec. p. 185); that approximately one hundred twenty persons

were summoned each year to serve upon Grand Juries in Calhoun County and that around four to five hundred jurors were summoned for petit jury service each year (Rec. p. 155). It was further disclosed that only one negro had been called for Grand Jury Service and only one negro had been called for petit jury service during the five years next preceding the indictment of petitioner. One jury commissioner testified that the three or four hundred names he had placed in the box included the names of only five negroes and that there were no more than twenty-five names of negroes in the box (Rec. p. 186). The testimony of the other jury commissioners was substantially the same. The trial judge, upon hearing of the motion for a new trial, sustained the objection of the State to the production of the jury roll for Calhoun County.

The Fourteenth Amendment forbids any discrimination against a race in the selection of a jury. **Aiken v. State of Texas**, 325 U. S. 398, 65 Sup. Ct. 1276, 89 L. Ed. 1692; **Hill v. State of Texas**, 316 U. S. 404, 62 Sup. Ct. 1161, 86 L. Ed. 1559; **Patton v. State of Mississippi**, 322 U. S. 463, 68 Sup. Ct. 184.

In the **Aikin v. State of Texas** case, 325 U. S. 398, 65 Sup. Ct. 1276, 89 L. Ed. 1692, the Supreme Court said:

> "But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.' "

In the case of **Norris v. State of Alabama**, 55 Sup. Ct. 579, 294 U. S. 587, 79 L. Ed. 1074, where the testimony disclosed that there was a total population of Jackson County of thirty-six thousand eight hundred eighty-one, of whom only two thousand six hundred eighty-eight were negroes, the Supreme Court of the United States held that the failure to call any negro for jury service over a long

period of time made out a prima facie case of denial of the equal protection of the laws which the Constitution guarantees.

The case of **Patton v. State of Mississippi**, 322 U. S. 463, 68 Sup. Ct. 184, presents a case where the State attempted to meet the prima facie evidence of racial discrimination by percentage calculations applied to a single jury. In that case the Supreme Court of the United States held that such practice was unwise. That purposeful and intentional discrimination was shown where the uncontradicted evidence disclosed that for thirty years or more no negro had served as a juror, though there was only a chance of one in four hundred that a negro would appear on a venire of one hundred jurors. It will not be presumed that so large a percentage of a population as represented by the negroes in Calhoun County, that is, twenty per cent of the population of Calhoun County, lacked sufficient qualifications for jury service as prescribed by the statute of the State of Alabama. Title 30, Section 21, 1947 Cumulative Supplement to Volume 6, Code of Alabama of 1940.

No motion for a change of venue was made by counsel designated by the trial court to "stand by" petitioner upon his arraignment or by the counsel designated by the trial judge less than one week prior to petitioner's trial before a petit jury to attend petitioner upon his trial. Article 1, Sections 6 and 75 of the Constitution of Alabama of 1901; Title 15, Sec. 267, 1940 Code of Alabama, Appendix E.

No motion for a continuance of the trial before a petit jury was made by either of said attorneys. Under Alabama law, where the local animosity is such that its natural tendency would be to intimidate or swerve the jury, or intimidate the court, a continuance of the trial should be granted. **Seay v. State of Alabama**, 207 Ala. 453;

16 C. J. 484, 453; 22 C. J. S., Criminal Law, paragraphs 482 and 497. One week prior to the trial of petitioner before the petit jury of Calhoun County, a judicial hearing was held in the court room of the Circuit Court of Calhoun County, presided over by petitioner's trial judge, wherein the State of Alabama was represented by the County Attorney for Calhoun County and the Circuit Court Solicitor for the State of Alabama. Attorneys not employed to represent petitioner, and not representing petitioner, requested a continuance of the trial. The judge denied the continuance requested because local animosity and feeling was so hostile, inflamed, prejudiced and biased against the accused that the people of Calhoun County, Alabama, would storm the jail were he not tried on June 7, 1948. The strong public sentiment against accused stated by the trial judge was concurred in by the County Attorney. When a court, or an officer of the court, has knowledge requiring the exercise of a duty on accused's behalf, failure to exercise such a duty constitutes a denial of due process of law. **Mooney v. Holohan,** 294 U. S. 103, 55 Sup. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406; **Hall v. Johnson,** Ninth Circuit, 91 Fed. (2d) 363; **Robinson v. Johnson,** 50 Fed. Sup. 774, 776.

We again reiterate the statement that petitioner's conviction was probably the result of his having been denied by the trial court the effective assistance of counsel to represent him upon his arraignment, in contravention of the Fourteenth Amendment to the Federal Constitution, and that his conviction was probably the result of his being denied due process of law by the trial court in forcing him to trial in a hostile, prejudiced and biased atmosphere probably sufficient to coerce the verdict of the jury sitting in trial of him. The effect of these denials of due process of law and the equal protection of the laws was to deprive petitioner of all procedural safeguards

which were his rights and which the trial court had the duty of protecting petitioner against any loss thereof.

Wherefore, it is submitted that this petition for certiorari to review the judgment of the Supreme Court of Alabama should be granted.

.....

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## APPENDIX A.

**Title 15, Section 318, 1947 Cum. Supp. to Vol. Four, 1940 Code of Alabama:**

"When counsel appointed for defendant in capital case.—When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defendant is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, and as compensation for said defense the attorney or attorneys so appointed shall be entitled in each case to a fee fixed by the judge presiding at said trial, which fee shall not be less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars, to be paid on the warrant of the state comptroller from the general funds in the state treasury. Said presiding judge in the case shall certify to the comptroller that 'The attorney or attorneys appointed by the court in the case of Alabama v. ..... (name of defendant) has (or, have) performed the service required of him (or them) in representing the said defendant and that the fee therefor has been fixed in the sum of ..... dollars (designate amount of fee).' Whereupon a warrant shall be drawn in favor of the attorney or attorneys upon the general funds of the treasury of the state of Alabama in payment therefor (1943, p. 221, appvd. June 24, 1943, 1947, p. 61, appvd. July 23, 1947.)"

## APPENDIX B.

**Title 15, Section 278, Code of Alabama of 1940:**

"Objections to indictments; how taken.—No objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same; and neither this objection, nor any other, can be taken to the formation of a special grand jury summoned by the direction of the court (1909, p. 305)."

## APPENDIX C.

**Title 15, Section 279, Code of Alabama of 1940:**

"Plea in abatement; when filed.—Any plea in abatement to an indictment must be filed at the first session at which the indictment was found, if the accused has been arrested, or if the accused has not been arrested, such plea in abatement must be filed at the first session at which it is practicable after the defendant has been arrested and in all cases such plea in abatement must be filed before the plea to the merits."

## APPENDIX D.

**Title 15, Section 276, Code of Alabama of 1940:**

"When prisoner stands mute, or refuses to plead.—If a defendant, when arraigned, refuses or neglects to plead, or stands mute, the court must cause the plea of not guilty to be entered for him."

## APPENDIX E.

**Title 15, Section 267, Code of Alabama of 1940:**

"Change of venue; trial removed on defendant's application, etc.—Any person charged with an indictable offense may have his trial removed to another county, on making application to the court, setting forth specifically the reasons why he cannot have a fair and impartial trial in the county in which the indictment is found; which application must be sworn to by him, and must be made as early as practicable before the trial, or may be made after conviction, on new trial being granted. The refusal of such application may, after final judgment, be reviewed and revised on appeal, and the supreme court or court of appeals shall reverse and remand or render such judgment on said application, as it may deem right, without any presumption in favor of the judgment or ruling of the lower court on said application. If the defendant is in confinement, the application may be heard and determined without the personal presence of the defendant in court (1909, p. 212)."

I, the undersigned, attorney of record in the matter of Lonnie James Ball, alias L. J. Ball, v. the State of Alabama, do hereby certify that I have served a copy of the above and foregoing petition and brief and argument in support thereof upon Hon. Albert A. Carmichael, Attorney General of the State of Alabama, and attorney of record in the above-styled cause for the State of Alabama, by mailing a copy thereof to him, addressed to him at his proper post office address, Judicial Building, Montgomery, Alabama, by United States Mail, with sufficient postage affixed to prepay all mailing charges.

This the .... day of ....., 1950.

.....

G. ERNEST JONES,

Counsel for Petitioner.